

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

APRIL TERM, 1926.

No. 4464.

324

No. —, SPECIAL CALENDAR.

FRANK W. STECK, APPELLANT,

vs.

UNITED STATES OF AMERICA

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED APRIL 9, 1926

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PRINTED MAY 19, 1926.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

**U.S. COURT OF SUPREME
FOR THE
DISTRICT OF COLUMBIA**

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VOL. 158

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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Court of Appeals of the District of Columbia

FRANK W. STECK, Appellant,

vs.

UNITED STATES OF AMERICA.

a Supreme Court of the District of Columbia.

Criminal. No. 43297.

UNITED STATES OF AMERICA, Plaintiff,

vs.

FRANK W. STECK, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1

Indictment.

Filed in Open Court May 18, 1925.

In the Supreme Court of the District of Columbia, Holding
a Criminal Term—April Term, A. D. 1925.

DISTRICT OF COLUMBIA, ss:

The Grand Jurors of the United States of America, in
and for the District of Columbia aforesaid, upon their oath,
do present:

That one Frank W. Steck, late of the District of Columbia
aforesaid, on, to wit, the twelfth day of May, in the year of

our Lord one thousand nine hundred and twenty-three, and at the District of Columbia aforesaid, knowingly, designedly and with intent to defraud, feloniously did falsely pretend and represent to one Jane M. Ferguson, then and there being, that one Elie Sheetz had purchased stock of the value of eleven thousand dollars in a certain corporation known as the Chautauqua Phonograph Company, and had the sum of eleven thousand dollars in money invested in the said Corporation.

By color and means of which said false pretenses and representations the said Frank W. Steck, on, to wit, the said twelfth day of May, in the year of our Lord one thousand nine hundred and twenty-three, and at the District of Columbia aforesaid, knowingly, designedly and with intent to defraud, feloniously and unlawfully did obtain from the said Jane M. Ferguson a certain instrument of writing in the form of a certificate of deposit in the Path Valley Bank of Dry Run, in the State of Pennsylvania, in the sum of eight hundred eighty-five dollars and forty-one cents,

2 which said certificate of deposit was dated on the second day of July, in the year of our Lord one thousand nine hundred and twenty-two, and was payable to the said Jane M. Ferguson, under the name of "Miss Jane Ferguson," one year after the date thereon, and was signed by one D. O. Shearer, as cashier of said Path Valley Bank, and which said certificate of deposit did then and there contain upon the back thereof certain writing in the form of an endorsement, of the tenor following, that is to say:

"Jane Ferguson";

and which said instrument of writing in the form of a certificate of deposit was then and there the property of the said Jane M. Ferguson, and was of the value of, to wit, eight hundred and eighty-five dollars and forty-one cents; which said instrument of writing, of the value aforesaid, the said Jane M. Ferguson, relying upon the false pretenses and representations aforesaid, which she believed to be true, and being deceived thereby did then and there deliver to the said Frank W. Steck.

Whereas, in truth and in fact, the said Elie Sheetz had not purchased stock of the value of eleven thousand dollars in the said corporation known as the Chautauqua

Phonograph Company, nor did he have the sum of eleven thousand dollars in money invested in the said Corporation; as he, the said Frank W. Steck, at the time of the making by him of the false pretenses and representations aforesaid, then and there well knew; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

Second Count.

3 And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That the said Frank W. Steck, on, to wit, the said twelfth day of May, in the year of our Lord one thousand nine hundred and twenty-three, and at the District of Columbia aforesaid, knowingly, designedly and with intent to defraud, feloniously did falsely pretend and represent to the said Jane M. Ferguson, then and there being, that the said Elie Sheetz had purchased stock of the value of eleven thousand dollars in the said corporation known as the Chautauqua Phonograph Company, and had the sum of eleven thousand dollars in money invested in the said Corporation.

By color and means of which false pretenses and representations the said Frank W. Steck, on, to wit, the said twelfth day of May, in the year of our Lord one thousand nine hundred and twenty-three, and at the District of Columbia, aforesaid, knowingly, designedly and with intent to defraud, feloniously and unlawfully did obtain from the said Jane M. Ferguson, eight hundred and eighty-five dollars and forty-one cents in lawful money of the said United States of America, of the value of eight hundred and eighty-five dollars and forty-one cents, of the money and property of the said Jane M. Ferguson; which said money, of the value aforesaid, the said Jane M. Ferguson, relying upon the false pretenses and representations aforesaid, which she believed to be true, and being deceived thereby did then and there deliver to the said Frank W. Steck.

Whereas, in truth and in fact, the said Elie Sheetz, had not purchased stock of the value of eleven thousand dollars in the said Corporation known as the Chautauqua Phonograph Company, nor did he have the sum of eleven

4 thousand dollars in money invested in the said corporation; as he, the said Frank W. Steck, at the time of the making by him of the false pretenses and representations aforesaid, then and there well knew; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

PEYTON GORDON,
*Attorney of the United States in and
for the District of Columbia.*

(Endorsed.)

Criminal. No. 43297. United States vs. Frank W. Steck. False pretenses. Witnesses: Jane M. Ferguson, Elie Sheetz. A true bill: Sam'l C. Redman, Foreman.

Plea in Bar to the Indictment.

Filed June 2, 1925.

* * * * *

Comes now Frank W. Steck in his proper person and by Philbrick McCoy, his attorney, and having waived the reading of the indictment says that the United States ought not further prosecute the same against him because he says that heretofore in the case of United States vs. Frank W. Steck, Criminal No. 42398, in this Court it was by the
5 oaths of the grand jurors of the United States presented that said Frank W. Steck, late of the District of Columbia, on to wit May 12, 1923, did knowingly, designedly and with intent to defraud, feloniously and falsely represent to one Jane M. Ferguson, then and there being that one Elie Sheetz had purchased stock of the value of eleven thousand dollars in a certain corporation known as the Chautauqua Phonograph Company and had the sum of eleven thousand dollars invested in the said corporation and that by color and means of said false pretenses and representations the said Frank W. Steck with intent to defraud did obtain from the said Jane M. Ferguson a "certain instrument in writing in the form of a certificate of deposit in the Path Valley Bank of Dry Run, in the State of Pennsylvania, in the sum of eight hundred and eighty-five dollars

and forty-one cents, which said certificate of deposit was dated on the second day of July, in the year of our Lord one thousand nine hundred and twenty-three and was payable to the said Jane M. Ferguson'' which was payable a year after date, which said certificate of deposit was the property of the said Jane M. Ferguson and was of the value of eight hundred and eighty-five dollars and forty-one cents and the said Jane M. Ferguson relying upon and being deceived by said false pretenses and representations of said Frank W. Steck did then and there deliver the same to him, whereas in truth and fact the said pretenses and representations were false as said Frank W. Steck at the time of the making of the same well knew, against the form of the statute in such cases made and provided and against the peace and government of the United States; and that to this indictment

6 the said Frank W. Steck pleaded not guilty and the United States joined issue on said plea; and a jury was thereupon duly summoned, impaneled and sworn to try said issue and upon their oaths did say that said Frank W. Steck was not guilty of the felony in the said last mentioned indictment laid to his charge whereupon it was by the Court considered that the said Frank W. Steck was not guilty as by the record more fully and at large appears. And the said Frank W. Steck who was the defendant in the indictment recited in this plea and acquitted as aforesaid and the Frank W. Steck mentioned and indicted in the indictment heretofore mentioned are one and the same person and not divers and different persons; and that the offense in the said last mentioned indictment set out and the one charged in the indictment to which this plea is pleaded are one and the same offense and not divers and different offenses in that the said indictments are word for word the same and identical except that a date is changed in order to conform to the proof, all of which said Frank W. Steck is ready to verify.

Wherefore by the empanelling of the said jury upon their oaths to try the said defendant upon the said issues joined defendant was put in jeopardy of his liberty and therefore defendant says that he ought not to be further called upon to answer the charge in the said indictment and he prays judgment that by the Court here he may be dismissed and discharged from the premises in the present indictment specified and contained.

Second Count.

And for a plea to the second count of the indictment herein he says that the said second count charging him with obtaining money to wit, "lawful money of the United States of America" by means of the false pretenses and representations as set forth in the first count of the said indictment is identical word for word with the second count of the indictment heretofore filed in this Court in the case of United States vs. Frank W. Steck, No. 42398; that on to wit the eighth day of April, nineteen hundred and twenty five, a jury was duly summoned, impaneled and sworn to try the issue upon the plea of not guilty made thereto upon which plea the United States joined issue and upon their oaths did say that the said Frank W. Steck was not guilty of the felony in the said last mentioned indictment laid to his charge whereupon it was by the Court considered that the said Frank W. Steck was not guilty as by the record more fully appears. And the said Frank W. Steck who was the defendant therein is the same Frank W. Steck mentioned in the indictment to which this plea is pleaded and not different and divers persons; and that the offense in the said last mentioned indictment to which this plea is pleaded and the one set forth in the former indictment are one and the same offense and not different and divers offenses in that the said offenses are charged in the same and identical words all of which the said Frank W. Steck is ready to verify.

Wherefore by the impenalling of the said jury upon their oaths to try the said defendant upon the issues joined the defendant was put in jeopardy of his liberty and he says that he ought not to be further called upon to answer the charge in the said indictment and he prays judgment that by the Court here he may be dismissed and discharged from the premises in the present indictment specified and contained.

PHILBRICK McCOY,
Attorney for Defendant.

Indictment.

Filed in Open Court September 30, 1924.

In the Supreme Court of the District of Columbia, Holding
a Criminal Term, July Term, A. D. 1924.

DISTRICT OF COLUMBIA, ss:

The Grand Jurors of the United States of America, in
and for the District of Columbia aforesaid, upon their oath,
do present:

That one Frank W. Steck, late of the District of Columbia aforesaid, on, to wit, the twelfth day of May, in the year of our Lord one thousand nine hundred and twenty-three, and at the District of Columbia aforesaid, knowingly, designedly and with intent to defraud, feloniously did falsely present and represent to one Jane M. Ferguson, then and there being, that one Elie Sheetz had purchased stock of the value of eleven thousand dollars in a certain corporation known as the Chautauqua Phonograph Company, and had the sum of eleven thousand dollars in money invested in the said Corporation.

By color and means of which said false pretenses and representations the said Frank W. Steck, on, to wit, the said twelfth day of May, in the year of our Lord one thousand nine hundred and twenty-three, and at the District of Columbia aforesaid, knowingly, designedly and with intent to defraud, feloniously and unlawfully did obtain from the said Jane M. Ferguson a certain instrument of writing in the form of a certificate of deposit in the Path Valley Bank of Dry Run, in the State of Pennsylvania, in the sum
9 of eight hundred eighty-five dollars and forty-one cents, which said certificate of deposit was dated on the second day of July, in the year of our Lord one thousand nine hundred and twenty-three and was payable to the said Jane M. Ferguson under the name of "Miss Jane Ferguson," one year after the date thereon and was signed by one D. O. Shearer, as cashier of said Path Valley Bank, and which said certificate of deposit did then and there contain upon the back thereof certain writing in the form of an endorsement, of the tenor following that is to say:

“Jane Ferguson”;

and which said instrument of writing in the form of a certificate of deposit was then and there the property of the said Jane M. Ferguson, and was of the value of, to wit, eight hundred and eighty-five dollars and forty-one cents; which said instrument of writing, of the value aforesaid, the said Jane M. Ferguson, relying upon the false pretenses and representations aforesaid, which she believed to be true, and being deceived thereby did then and there deliver to the said Frank W. Steck.

Whereas, in truth and in fact, the said Elie Sheetz had not purchased stock of the value of eleven thousand dollars in the said corporation known as the Chautauqua Phonograph Company, nor did he have the sum of eleven thousand dollars in money invested in the said Corporation; as he, the said Frank W. Steck, at the time of the making by him of the false pretenses and representations aforesaid, then and there well knew; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

10

Second Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That the said Frank W. Steck, on, to wit, the said twelfth day of May, in the year of our Lord one thousand nine hundred and twenty-three, and at the District of Columbia aforesaid, knowingly, designedly and with intent to defraud, feloniously did falsely pretend and represent to the said Jane M. Ferguson, then and there being, that the said Elie Sheetz had purchased stock of the value of eleven thousand dollars in the said corporation known as the Chautauqua Phonograph Company, and had the sum of eleven thousand dollars in money invested in the said Corporation.

By color and means of which false pretenses and representations the said Frank W. Steck, on, to wit, the said twelfth day of May, in the year of our Lord one thousand nine hundred and twenty-three, and at the District of Columbia aforesaid, knowingly, designedly and with intent

to defraud, feloniously and unlawfully did obtain from the said Jane M. Ferguson, eight hundred and eighty-five dollars and forty-one cents in lawful money of the said United States of America, of the value of eight hundred and eighty-five dollars and forty-one cents, of the money and property of the said Jane M. Ferguson; which said money, of the value aforesaid, the said Jane M. Ferguson, relying upon the false pretenses and representations aforesaid, which she believed to be true, and being deceived thereby did then and there deliver to the said Frank W. Steck.

Whereas, in truth and in fact, the said Elie Sheetz,
 11 had not purchased stock of the value of eleven thousand dollars in the said Corporation known as the Chautauqua Phonograph Company, nor did he have the sum of eleven thousand dollars in money invested in the said corporation; as he, the said Frank W. Steck, at the time of the making by him of the false pretenses and representations aforesaid, then and there well knew; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

PEYTON GORDON,
*Attorney of the United States in and
 for the District of Columbia.*

(Endorsed.)

Criminal. No. 42398. United States vs. Frank W. Steck. False pretenses. Witnesses: Jane M. Ferguson, Mary Ferguson, Elie Sheetz. A true bill: J. Frank White, Foreman.

Memoranda.

October 7, 1924.—Arraigned, Plea Not Guilty on Indictment No. 42398.

12 November 7, 1925.—Motion and plea in bar to the indictment argued and overruled.

Supreme Court of the District of Columbia.

Wednesday, November 18", A. D. 1925.

The Court resumes its session pursuant to adjournment, Mr. Justice Bailey, presiding.

* * * * *

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance and by his attorney Philbrick McCoy, Esquire; and thereupon comes a jury of good and lawful men of the District of Columbia, to wit:

John H. Clipper,
Raymond A. Couch,
William B. Davis,
Samuel Galblum,
Lewis S. Hart,
Fred'k H. Hohoff,

Paul E. Holden,
Wm. J. Holtman, Jr.,
H. H. Kreisher,
Harry Kronheimer,
John G. Kuhn,
Harry G. Le Dane,

who being sworn to well and truly try the issues joined herein, upon their oath say that the defendant is guilty as to the first count of the indictment and, by direction of Court, not guilty as to the second count; whereupon it is considered by the Court that the said defendant go thereof without day as to the second count; and thereupon said defendant is committed to the Washington Asylum and Jail, and the case is referred to the Probation Officer.

Friday, December 4", A. D. 1925.

The Court resumes its session pursuant to adjournment: Mr. Justice Bailey, presiding.

* * * * *

13 Come as well the Attorney of the United States, as the defendant in proper person, in custody of the Superintendent of the Washington Asylum and Jail, and by his attorney Philbrick McCoy, Esquire; and thereupon it is demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him and he says nothing except as he has already said; whereupon it is considered by the Court that for his said offense, the said defendant be taken by the Superintendent aforesaid, to the Asylum and Jail aforesaid, whence he came, thence to the Penitentiary, as designated by the Attorney General of the United States, there to be imprisoned for the period of Three (3) Years, to take effect from and including date of arrival of said defendant at said Penitentiary; and thereupon the defendant by his attorney notes

an appeal to the Court of Appeals of the District of Columbia, from the judgment of the Court in this case; whereupon the Court fixes the amount of Bond for costs on appeal at One Hundred Dollars or Fifty Dollars in Cash.

Memorandum.

December 23, 1925.—Cost Bond on Appeal—filed.

Assignment of Errors.

Filed December 24, 1925.

* * * * *

Comes now the defendant and assigns as errors committed by the trial court herein, the following:

1. Overruling special plea of former jeopardy filed by the defendant on the 2nd day of June 1925.
- 14 2. In overruling motion at the close of the Government's case for a directed verdict in favor of the defendant.
3. In the admission of evidence over the objection and exception of defendant.
4. In the exclusion of evidence over the objection and exception of defendant.
5. In overruling motion for directed verdict in favor of the defendant at the close of all the evidence.

P. McCOY,
R. E. LYNCH,
Attorneys for Defendant.

Service of a copy of the above is acknowledged this 24th day of December 1925.

C. G. SCHENKEN,
District Attorney's Office.

Memorandum.

December 24, 1925.—Bill of Exceptions—filed.

Designation of Record.

Filed December 24, 1925.

* * * * *

The Clerk of the Supreme Court of the District of Columbia will please prepare record on appeal in this case, and the following are hereby designated as necessary to be copied.

1. Indictment.
2. Special plea.
- 15 3. Indictment in Criminal No. 42398.
4. Memo.: Special plea denied.
5. Plea.
6. Memo.: Verdict of Jury.
7. Judgment.
8. Memo.: Appeal noted in open court.
9. Memo.: Appeal bond approved and filed.
10. The bill of exceptions.
11. Assignment of Errors.
12. This designation.

P. McCOY,
R. E. LYNCH,
Attorneys for Defendant.

Service of a copy of the above is acknowledged this 24th day of December 1925.

C. G. SCHENKEN,
District Attorney's Office.

Supreme Court of the District of Columbia.

Saturday, January 30", A. D. 1926.

The Court resumes its session pursuant to adjournment: Mr. Justice Stafford, presiding.

Bailey, J.

* * * * *

Now comes here the defendant by his attorneys Messrs. Philbrick McCoy and R. E. Lynch, and prays the Court to sign and make a part of the record his Bill of Exceptions taken during the trial of the case and filed on December 24", 1925, which is accordingly done.

16 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 15, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in Criminal Cause No. 43297, wherein United States of America is Plaintiff and Frank W. Steck is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 2nd day of March, 1926.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,

Clerk,

By CHAS. B. COFLIN,

Assistant Clerk.

17 Filed Dec. 24, 1925. Morgan H. Beach, Clerk.

In the Supreme Court of the District of Columbia.

Criminal. No. 43297.

UNITED STATES

vs.

FRANK STECK.

Notice.

To Honorable Peyton Gordon, United States Attorney for
the District of Columbia:

Please take notice that I shall submit to the Court for
settlement and approval, the bill of exceptions herein on
the 22nd day of January 1926.

PHILBRICK McCOY,

PHIL. McCOY,

R. E. LYNCH,

R. E. LYNCH,

Attorneys for Defendant.

Service of a copy of the above notice, together with a
copy of the bill of exceptions herein referred to, is acknowl-
edged this 24rd day of December 1925.

C. G. SCHENKEN,

U. S. Attorney's Office.

18 Filed Dec. 24, 1925. Morgan H. Beach, Clerk.

Submitted Dec. 24, 1925. Jennings Bailey, Justice.

In the Supreme Court of the District of Columbia, Holding
a Criminal Court.

Criminal. No. 43297.

UNITED STATES

vs.

FRANK W. STECK.

Bill of Exceptions.

Upon the hearing of the special plea of former jeopardy
filed by the defendant, the United States Attorney and

counsel for the defendant stipulated that the certificate of deposit mentioned in the indictment No. 42398, is the exact and same certificate of deposit mentioned in Indictment No. 43297. That there was only one transaction as to said certificate of deposit between the said Jane Ferguson and Frank W. Steck.

This cause coming on for trial before the Honorable Jennings Bailey, Justice of the Supreme Court of the District of Columbia, on the 18th day of November A. D. 1925, the United States being represented by William H. Collins, Esq., U. S. District Attorney in and for the District of Columbia, and the defendant, Frank W. Steck by Philbrick McCoy, Esq.

Thereupon a jury was empanelled and sworn to try the defendant upon the above entitled indictment.

Whereupon, by stipulation of counsel, a certain instrument referred to in the indictment was introduced and put in evidence in the words and figures as follows:

19 Path Valley Bank.

No. 2998. Dry Run, Pa., July 2nd, 1922.

Miss Jane Ferguson has deposited in this Bank Eight Hundred Eighty Five and 41/100 Dollars payable One Year after date to the order of Herself with interest at 4 per cent compounded semi-annually if left 12 months on the return of this certificate properly endorsed. Thirty days' notice of an intention to withdraw must be given.

885.41.

Not subject to check.

D. O. SHEARER,
Cashier.

Back of Above Certificate.

Jane Ferguson.

F. W. Steck.

For Deposit Acct. of District Guaranty Corporation,
Washington, D. C.

Citizens National Bank of Dry Run, Penna.

National Metropolitan Bank, Washington, D. C.

Federal Reserve Bank of Philadelphia, Penna.

20 And it was further stipulated that at the time said certificate was issued there were funds in said bank

enough to pay the same; that there were sufficient funds there in May 1923, and that said certificate was paid.

Whereupon there was called as a witness for the United States one **Jane Ferguson**, who testified in substance as follows: that she became acquainted with the defendant in March, 1923, at his place of business in the District of Columbia, and that she had seen the original of the above mentioned certificate, and that she had the original at the time of her dealings with the defendant; that she endorsed the original on the 25th day of April 1923, at the defendant's request. That he asked her to buy stock in the Chautauqua Phonograph Company, Inc. That the defendant said that she would not lose any money on the deal; that it would pay 12 per cent, and that one Elie Sheetz had bought \$11,000 worth of stock in said Company, and that she would not have bought the stock otherwise. Whereupon she endorsed the certificate above referred to, to the said defendant, in payment of her stock. She further testified, on cross examination, that on the day when she endorsed the certificate, which she claimed to be May 12, 1923, she received nothing from the defendant in return. She identified her signature on certain papers hereinafter referred to. She denied that the money was placed in the defendant's hands as a loan, but admitted that on a previous occasion she had given him money as a loan, and that he had paid her interest thereon, as evidenced by a receipt which she identified as follows:

“April 7th, 1923.

Received from F. W. Steck Five Dollars interest money.
JANE M. FERGUSON.”

21 She further identified a receipt for interest subsequent to the transaction herein involved as follows:

“Washington, D. C., April 29th, 1923.

Rec'd of F. W. Steck \$15.00.

JANE M. FERGUSON.”

She denied that there was anyone else present at any time during the transactions. She having identified a certain receipt, the same was admitted in evidence.

“Washington, D. C., November 26th, 1923.

“Received from F. W. Steck two notes for \$1,887.00 each one for six months from date and one for twelve months from date. These notes given in full payment for all stock purchased in the Chautauqua Phonograph Company, Ind., including my Sister, Miss Mary Ferguson of Spring Run, Penna., also includes my International Finance Corporation Stock also includes everything Mr. Steck owes me.

JANE FERGUSON.” [SEAL.]

Witness:

H. BARCLAY RICH.”

The witness testified that the Chautauqua Phonograph Stock mentioned in the above receipt, was the same stock which she had previously purchased from the defendant. She further testified that at the time of the giving of this receipt hereinbefore referred to, on November 26, 1923, she was entirely satisfied with the transaction, and that on the 5th day of August 1924, she caused suit to be filed on the Law side of this court upon one of the notes therein referred to, which said suit is now pending.

Whereupon **Elie Sheetz** was called as a witness for the United States and testified substantially that he knew the defendant in April or May 1923, and that he had
22 never purchased stock in the Chautauqua Phonograph Company, or in any other Company.

Whereupon the United States rested.

Whereupon the defendant moved the Court to direct a verdict of not guilty in favor of the defendant, but the Court overruled the said motion and exception was noted.

The defendant to maintain the issue took the witness stand in his own behalf, and testified substantially that he had known the complaining witness since about March 1923; that she had been in the store frequently to see an employee and that she became interested in the business; that on the 7th day of April 1923, she made a loan to him personally in the sum of \$900.00, on which he agreed to pay her interest, and did pay her interest. That later, on April 25, 1923, she endorsed to him the certificate of deposit hereinbefore referred to. Whereupon he gave her his personal check in words and figures to wit:

No. 545. Washington, D. C., April 25th, 1923.

Terminal Commercial and Savings Bank. 15-101.

Pay to the order of Miss Jane Ferguson \$85.41 Eighty-five and 41/100 Dollars.

(Sgd.)

F. W. STECK.

(On back:) (Sgd.) Jane Ferguson."

which was admitted in evidence. That the transaction was a completed personal loan of \$800, as evidenced by said certificate and said check. That he made no representations or misrepresentations at any time to her about Elie Sheetz and denied that he stated to Jane Ferguson that one Elie Sheetz had purchased \$11,000.00 worth of stock in the Chautauqua Phonograph Company. That she told him on both occasions above mentioned to use the money as he saw fit,

23 and that he turned the money into the said company, as more fully appears hereafter. That on May 27, 1923, she, having made further loans to him at various times, agreed to purchase part of his personal stock in the said company and the loans heretofore referred to were to be in payment of said stock and that he, in her presence, directed one Margaret L. Bower to leave a note for one Chester I. Finn to prepare the certificates; that he was not present when said certificate of stock was delivered. That in November 1923, she desired to dispose of her holdings in said company, and that accordingly, he gave her two certain notes in the sum of \$1,887.00 each, payable in six and twelve months from date, and took from her a receipt dated November 26, 1923, above referred to.

On cross examination he testified, over objection by counsel, that he told her that the company had a factory in Pennsylvania.

An exception to the admission of this testimony was allowed. He further testified over objection and exception of counsel that he had never represented to anyone, and more particularly to one Mary Ferguson, that he had sold eleven thousand dollars' worth of stock to Elie Sheetz.

Whereupon **Margaret L. Bower** was called as a witness for the defense, and testified that she was a bookkeeper for

the Chautauqua Phonograph Company; that -he made the entries in a certain ledger, on page 107 as follows:

“April 7th, 1923.

“Deposited \$900.00. F. W. Steck. Dep. \$906.00.
Advanced to Company. Also \$6.00 payment.”

And on page 115 as follows:

April 25, 1923.

800.00.

Mr. Steck advanced the company \$800.00 and he paid out \$310 and Mrs. Bixler paid \$28.00 on large note to District Guaranty Corp. due 335.00 each month on the 15th.

He also paid out \$330.00 this amount was advanced by District Guaranty Corp. for two week- salary for payroll at Jamestown.

Balance deposited in bank to Co. 160.00.

24 That said entries were offered in evidence, and the Court admitted the entry on page 107, but excluded the entry on page 115, to which ruling, excluding the entry on page 115, an exception was noted and allowed. She testified further that she was present when Jane Ferguson told the defendant that she would take stock in the said company. Witness denied that the defendant made any representations regarding one Elie Sheetz or any stock holdings of the said company. That said Jane Ferguson at that time asked said Margaret L. Bower if she had any stock in said company, and that she replied in the affirmative.

Whereupon the said Margaret L. Bower wrote the instructions to Chester I. Finn, as directed by the defendant to prepare the certificates, and that the defendant was in charge of the office at the time.

Whereupon **Chester I. Finn** was called as a witness for the defense and testified as follows:

That he was employed by the Chautauqua Phonograph Company on May 27 and 28, 1923; that he received instructions above referred to to prepare certain certificates of stock in the company for Jane Ferguson, and that he prepared the certificates as follows:

"Number.	Shares.
85	115

Incorporated under the Laws of the State of Delaware.

Capital Stock \$1,000,000.

This certifies that Miss Jane M. Ferguson is the owner of One Hundred Fifteen Shares of the Capital Stock of Chautauqua Phonograph Co., Inc., fully paid and non-assessable, transferable only on the books of this Corporation in person or by Attorney upon surrender of this Certificate properly endorsed.

25 In witness whereof, the said Corporation has caused this Certificate to be signed by its duly authorized officers and its Corporate Seal to be hereunto affixed, this 28th day of May, A. D. 1923.

(Seal Chautauqua Phonograph Co., Inc., Delaware,
1920.)

(Sgd.) J. H. BUSCHER,
President.

(Sgd.) P. MARION WALKER,
Secretary-Treasurer.

Shares 10 Each.

In presence of

(Sgd.) MISS JANE M. FERGUSON.

Number.	Shares.
97	230

Incorporated under the Laws of the State of Delaware.

Chautauqua Phonograph Co., Inc.

Capital Stock \$1,000,000.

This certifies that Miss Jane M. Ferguson is the owner of Two Hundred Thirty Shares of the Capital Stock of Chautauqua Phonograph Co., Inc., fully paid and Preferred. non-assessable. Transferable only on the books of this Corporation in person or by

Attorney upon surrender of this Certificate properly endorsed.

In witness whereof, the said Corporation has caused this certificate to be signed by its duly authorized officers and its Corporate Seal to be hereunto affixed, this 28th day of May A. D. 1923.

(Seal Chautauqua Phonograph Co., Inc., 1920.)

(Sgd.)

J. H. BUSCHER,
President.

(Sgd.) P. MARION WALKER,
Secretary-Treasurer.

Shares 10 Each.

In presence of

— — —.

(Sgd.)

MISS JANE M. FERGUSON.

26 The certificates were admitted in evidence. He further testified that he later, and prior to November 26, 1923, heard a conversation between the defendant and said Jane Ferguson with reference to a resale of the stock by her to the defendant, at which time she stated she was satisfied with the stock transaction, and that as defendant seemed to want it very much, it must be worth something, and that she would keep it.

Whereupon the defendant rested, and **Mary Ferguson** was called as a witness for the United States, who testified over objection of counsel for the defendant as follows:

That Mary Ferguson testified that the defendant Frank W. Steck had told her at her home in Pennsylvania that he had sold eleven thousand dollars' worth of stock in the Chautauqua Phonograph Company to Elie Sheetz. The court overruling the objection to this testimony an exception was noted and allowed.

Thereupon the Government closed its case. The defendant moved the court to direct a verdict of not guilty, which motion was overruled & exception noted.

The foregoing is the substance of all the testimony adduced on behalf of the United States and the defendant, Frank W. Steck, on the issues joined.

That then and thereupon the Assistant District Attorney addressed the jury on behalf of the United States; and counsel for the defendant, Frank W. Steck, addressed the jury on his behalf.

That then and thereupon the District Attorney made the concluding argument to the jury on behalf of the United States.

That then and thereupon the court charged the jury as to the first count and directed a verdict of not guilty on the second count of the indictment.

27 And thereupon, as all of said exceptions were duly noted and allowed as aforesaid, and duly entered upon the minutes of the Court before the jury retired to consider of its verdict, and because the matters and things hereinbefore recited are not matters of record, in order to make the same a part of the record herein which is hereby ordered, so that the defendant may have his case reviewed on appeal, the defendant by his attorneys, moves the court to sign and seal this his bill of exceptions, to have the same force and effect as if it, and everyone of said exceptions had been separately signed and sealed, which motion is granted by the court, and thereupon the defendant tenders this his bill of exceptions, and requests the court to sign and seal the same, which is accordingly done this 30th day of January A. D. 1926.

JENNINGS BAILEY,
Justice.

28 [Endorsed:] Criminal. No. 43,297. U. S. vs. Steck. Bill of Exceptions. P. McCoy, R. E. Lynch, Attorneys for Defendant. Filed Dec. 24, 1925. Morgan H. Beach, Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 4464. Frank W. Steck, appellant, vs. United States of America. Court of Appeals, District of Columbia. Filed Apr. 9, 1926. Henry W. Hodges, clerk.

FOR MR. JUSTICE VAN ORSDEN.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

AUG 30 1926

Henry H. Dodge

CLERK

IN THE
Court of Appeals, District of Columbia

No. 4464.

No. 5 Special Calendar

October Term 1926

No.— SPECIAL CALENDAR.

FRANK W. STECK, *Appellant*

vs.

UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF APPELLANT.

ROBERT E. LYNCH,
Counsel for Appellant.

IN THE
Court of Appeals, District of Columbia

No. 4464.

No.— SPECIAL CALENDAR.

FRANK W. STECK, *Appellant*

vs.

UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF CASE.

The appellant was first indicted on September 30th, 1924, for the offense of false pretenses. (Rec. p. 7) Thereafter, he was tried and acquitted on both counts of the said indictment.

On May 18th, 1925, the appellant was again indicted for the offense of false pretenses. (Rec. p. 1) The first and second indictments differ only in the date of the certificate of deposit alleged to have been passed

from the complaining witness to the defendant. In the first indictment the date of the certificate of deposit is alleged July 2, 1923, in the second indictment the date alleged of the said certificate is July 2, 1922.

After acquittal on the first indictment and before the trial of the second indictment, the defendant filed his plea in bar to the second indictment. (Rec. p. 4) The Government filed no pleading whatever in answer to the said plea. The Court overruled defendant's plea in bar. (Rec. p. 9.)

Thereafter a second trial was had; defendant was found guilty on first count of the indictment, and by direction of Court not guilty on the second count. From the judgment on the verdict of guilty, this appeal is taken.

The assignments of error are as follows:

1. Overruling special plea of former jeopardy filed by the defendant on the 2nd day of June, 1925.
2. In overruling motion at the close of the Government's case for a directed verdict in favor of the defendant.
3. In the admission of evidence over the objection and exception of defendant.
4. In the exclusion of evidence over the objection and exception of defendant.
5. In overruling motion for directed verdict in favor of the defendant at the close of all the evidence.

**THE PLEA IN BAR SHOULD HAVE BEEN
SUSTAINED.**

The offense alleged in the two indictments is the same; that is, the obtaining of a certificate of deposit

from Jane Ferguson by means of a false representation on May 12, 1923.

The plea in bar (Rec. pp. 4, 5, 6) alleges with certainty the facts of the identity of the offense in the two indictments, also the verdict of not guilty by the jury. The Court had jurisdiction, there was a valid indictment, the parties were the same. There was only one certificate of deposit given by Jane Ferguson to the defendant. *The date of alleged false representation is identical in each indictment.* No allegation of the plea in bar is denied.

This court in Nordlinger v. U. S. 24 App. D. C., p. 409 said:

“The Court had unquestioned jurisdiction, and the indictment was, on its face at least, technically formal and substantially good. As has been seen the property charged in each indictment was the same in fact though described somewhat differently, belonged to the same owner, and was unlawfully taken under the same circumstances from the possession of the same person, at the same time and place. The test of the identity of offenses that has commonly been applied in such cases is whether the facts necessary to conviction under the second indictment would have been sufficient if proved, to warrant a conviction under the first, for the same offense.” Citing cases.

The certificate of deposit in both indictments was the same, though described differently. There was only one transaction.

The Supreme Court of the United States in Grafton v. U. S. 205 U. S. at p. 350, 351, 51 L. ed. 1090, quotes with approval Mr. Bishop as follows:

“Mr. Bishop in his Treatise on Criminal Law, 7th ed. 1050, says: It is not necessary to establish the defense ‘autre fois acquit’ or ‘convict’ that the offense in each indictment should be the same in name. If the transaction is the same or if each rests upon the same facts between the same parties, it is sufficient to make good the defense.”

The opinion of the court in part in the same case is as follows;

“But we rest our decision of this question upon the broad ground that the same acts constituting a crime against the United States cannot after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for the crime in the same or in another court, civil or military, of the same government.”

See also:

Kepner v. United States, 195 U. S. 127; 49 L. ed. 123.

Ex Parte Lange, 85 U. S., 391; 21 L. Ed. 872.

U. S. vs. McConnell, *et al.*, 10 F. (2d) 977.

The latest utterance of the Supreme Court of the United States on the right of a defendant to be protected from a second prosecution for the same offense is stated by Mr. Justice Holmes in *U. S. v. Herman Oppenheimer*, 242 U. S. p. 85; 61 L. ed. 161. The facts in the case are stated by the Court as follows:

“The defendant in error and others were indicted for a conspiracy to conceal assets from a trustee in Bankruptcy. Act of July 1, 1898, Chap. 541, Sec. 2930 Stat. at L. 544, Comp. Stat. 1913,

Sec. 9585, 9613. The defendant Oppenheimer set up a previous adjudication upon a former indictment for the same offense that it was barred by the one year statute of limitations in the bankruptcy Act for offenses against that act, Sec. 29d, an adjudication since held to be wrong in another case. *United States v. Rabinowih*, 238 U. S. 78; 59 L. ed. 1211, 35 Sup. Ct. Rep. 682."

The opinion of the Court in part is as follows:

"Upon the merits the proposition of the government is that the doctrine of *res judicata* does not exist for criminal cases except in the modified form of the 5th Amendment, that a person shall not be subject for the same offense to be twice put in jeopardy of life or limb; and the conclusion is drawn that a decision upon a plea in bar cannot prevent a second trial when the defendant never has been in jeopardy in the sense of being before a jury upon the facts of the offense charged. It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightfully mentioned with solemn reverence are less than those that protect from a liability in debt. It cannot be that a judgment of acquittal on the ground of the Statute of Limitations is less a protection against a second trial than a judgment upon the ground of innocence, or that such a judgment is any more effective when entered after a verdict than if entered by the government's consent before a jury is empaneled; or that it is conclusive if entered upon the general issue."

"We may adopt in its application to this case the statement of a judge of great experience in the criminal law 'Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, the adjudication, whether it takes the form of an acquittal or con-

viction, is final as to the matter so adjudicated upon and may be pleaded in bar to any subsequent prosecution for the same offense. * * * In this respect the criminal law is in unison with that which prevails in civil proceedings.' " Citing cases.

And further it is stated;

"The safeguard provided by the Constitution against the gravest abuses had tended to give the impression that when it did not apply in terms, there was no other principle that could. But the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice (*Jeter v. Hewitt*, 22 How. 352, 364, 16 L. ed. 345, 348) in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time."

The Supreme Court of California in the case of *People vs. Terrill*, 132 Calif., 497; 64 Pac., 894 held:

On a trial for forgery, the court excluded the instrument claimed to be forged on the ground of variance with the indictment, and directed a verdict for the defendant; and a verdict was returned of "not guilty" on the ground of a material variance between the note set forth in the indictment and the note offered. It was held that the defendant could not again be tried for the offense, since by the verdict he was acquitted, and it was immaterial what reason the jury gave for the acquittal, or that there was in fact no material variance.

In *People vs. Webb*, 38 Calif., 467, it was held:

Where one was placed on trial for perjury, and the evidence showed that the trial in which

he was alleged to have perjured himself occurred on the 11th of April, while the indictment charged the crime to have been committed on the 12th of April, and, in accordance with a peremptory instruction, the jury found him not guilty, jeopardy attaches.

In *Roberts vs. State*, 14 Ga., 8, the court said:

“To avoid any confusion on this subject, we adopt the rule as it is otherwise more generally and perhaps more accurately expressed, *i. e.*, that the plea of *autre fois acquit* or *autre fois convict* is sufficient, whenever the proof shows the second case to be the *same transaction with the first*. 7 Humph., 508, Thach., 206, 207. That rule is decisive on this case.”

In *Holt vs. State*, 38 Ga., 189, it is said:

“The question to be answered is, has the defendant been arraigned and put upon his trial upon a sufficient legal accusation, for the same criminal act with which he is charged the second time? If he has, then he has been put in jeopardy, within the intent and meaning of the Constitution, and can not be tried the second time for the same criminal acts, under the same or a different named offense.”

In *State vs. Cameron*, 50 Tenn., 78, at p. 86, the court said:

“There can be no doubt that a former acquittal or conviction, must be for the same offense, but it is not necessary that all the particulars charged in either indictment should be the same.”

NO SUBSTANTIAL EVIDENCE TO SUBMIT TO THE JURY.

There were only two witnesses for the Government in its case in chief. Jane Ferguson, the prosecuting witness, testified that on April 25, 1923, at defendant's request she endorsed a certificate of deposit. That defendant asked her to buy stock in the Chatauqua Phonograph Company, Inc., that she would not lose any money on the deal; that it would pay 12 per cent, and that Elie Sheetz had bought \$11,000 worth of stock in said Company and that she would not have bought the said stock otherwise. Elie Sheetz, the only other witness, testified that he had not purchased \$11,000 worth of said stock in the Chautauqua Phonograph Company, Inc.

There was no evidence that Jane Ferguson ever lost any money in the transaction, or that the stock did not pay 12 per cent. She was familiar with business transactions for the record discloses she loaned money and collected interest on said loans.

The mere representation that one Elie Sheetz had purchased Eleven Thousand Dollars worth of stock in said Company is not such a material representation of fact sufficient to justify conviction of the offense charged. There was no other representation made by defendant claimed to be false, except that one concerning the purchase of stock by Elie Sheetz.

Conceding, but not admitting, it was false, then it was not such a substantial false representation of fact to sustain a conviction. At most it was only collateral. The complaining witness did not testify she knew Elie Sheetz or that she had faith in his judgment, or that his judgment on such matters was of any value or significance.

Was the inducement to purchase stock the statement that witness would not lose anything, was it the 12 per cent return, or was it that Elie Sheetz was a stockholder. She testified that the purchase would not have been made except for the above statements (Rec. p. 16). The material statements of the defendant apparently were true, for there is no denial of them in the record.

In *Urban vs. Tyszka*, 16 Pa. Dist. 625, the Court held;

A false statement concerning a collateral matter, intended to induce a purchase or the making of a subscription to a charitable or religious cause, is not a false pretense within the meaning of the statutes, as where one soliciting a subscription for the building of a Roman Catholic Church falsely represents that he is a Roman Catholic priest.

NO CRIMINAL INTENT.

The admissions of Jane Ferguson, the complaining witness, that she accepted two promissory notes from the defendant in full payment of any claim relating to the transaction of the Chautauqua Phonograph Company, Inc., clearly shows there was no criminal intent on the part of the defendant to fraudulently obtain the property of the witness by false pretenses.

If defendant was possessed of an unlawful intent would he have further troubled himself of executing and delivering to witness the promissory notes, as admitted by her?

The time between the original transaction and the filing of the first indictment (one year and four months) tends to show that the transaction was one

purely of a civil contract with no element of criminal intent.

On the general question of intent see:

Alpert vs. U. S. 12 F. (2d) 352—

In Ambrose v. U. S. 45 App. D. C. at p. 123, it is said:

“It follows, therefore, from what we have said, that if the mere act of taking will not raise the presumption of a felonious intent in a prosecution for larcency, there can be no valid reason why the act of conversion should do so in the trial of an indictment for embezzlement.”

NO DEFRAUDING

The elements of the offense of false pretenses are stated by this Court in Robinson vs. United States, 42 App. D. C., at p. 192.

“Our false pretenses statute, like most American Statutes on the subject is modeled after the statute of 52 Geo. III. Chap. 64, 1. The elements of the offense are a false pretense or false representation by the defendant or someone acting for and instigated by him, knowledge by the defendant as to the falsity, reliance on the pretense or representation by the person defrauded, intent to defraud *and an actual defrauding.*”

The record in this case shows that the complaining witness received stock in the Chautauqua Phonograph Company, Inc. That she was satisfied with the transaction (Rec. p. 17); that six months subsequent to the date of the original transaction she accepted two promissory notes in full payment of the Chautauqua

Phonograph stock received by her from the defendant and for other stock belonging to witness and her sister.

The above conduct of the parties does not show restitution of property fraudulently obtained from another, but an exchange of a promissory note from the defendant to the prosecuting witness for the return of the stock.

There was no testimony that the stock in question was worthless, and it must be, in the light of the facts in this case, be assumed to be valuable.

In *State vs. Clark*, 64 Kansas, 65, the facts disclosed the defendant obtained \$5,600 from a bank by false representation to be the owner of 143 head of steers and had a right to mortgage same. He gave a note with endorsers and mortgage on steers to secure loan. It later appeared defendant did not have all of the cattle included in the mortgage. The bank realized on security except the sum of \$1,831. The conviction was reversed on appeal.

The Court set forth the elements necessary to constitute the offense and then continues thus;

“Tested by the above rules, which seem to be supported by reason and authority, it must appear that someone has been defrauded to insure a conviction. This one element is essential. Can it be said the Stockyard bank has actually been defrauded by the defendant, when it holds a note upon which there is a balance of less than \$2000 and the endorsers thereon are solvent, and no steps are taken to enforce the collection? The language of the court in *People v. Wakelay* 62 Mich. 297 is: ‘But it does not amount, in law, to a false pretense unless made with a fraudulent intent, and the person parting with the property is actually defrauded.’ Was the stockyard

bank actually defrauded? What right was it deprived of in the business transaction? It had parted with the money, but it held a note which was conceded to be good, aside from the security given by the defendant and we fail to see in what way it was injured. If it was not defrauded, this essential ingredient of the crime was lacking, and unless evidence can be produced to show that the bank was actually defrauded, the defendant should be discharged.”

In *Commonwealth vs. Quinn et al*, 222 Mass. at p. 512, the court held that the statement by one of the defendants to the effect that he (the defendant), had been offered \$42,000 for the Holyoke property would not constitute such a false pretense as to hold defendant criminally liable. The court said:

“We think it plain that if such statements are not grounds of civil liability, with stronger reason they cannot be held to constitute a criminal offense.” Citing numerous authorities.

In *Commonwealth v. Stevenson*, 127 Mass. at bottom p. 448, the court held the statement of defendant that one Conlin was “A man worth ten thousand dollars” was not such a statement of material fact to base a charge of false pretenses. It appeared that defendant was endeavoring to obtain a lease for Conlin to certain premises from the complaining witness.

In *Foster v. Goldsoll*, 48 App. D. C. at p. 532, this Court stated:

“And at this point it may be observed that in a criminal case the accused is entitled, where two interpretations are open, to that consistent with innocence.”

THE COURT SHOULD HAVE DIRECTED A VERDICT OF NOT GUILTY AT CLOSE OF ENTIRE CASE.

It is earnestly urged that the trial court should have directed a verdict of not guilty in favor of the defendant upon the close of the entire case for the reasons that the testimony did not measure up sufficiently to sustain the burden placed upon the Government in a criminal case. The substantial proof showed a course of business dealings between the parties in which no complaint was made until the elapse of over a year. There was no denial of the receipt of the check of defendant on April 25, 1923, for \$85.41, this being the same day prosecuting witness stated she endorsed certificate of deposit for the defendant in the sum of \$885.41. She had received interest on money loaned defendant prior and subsequent to that date. There is no denial of the loan on April 7th, 1923, of \$900 from Jane Ferguson to defendant. Nor is there any denial of the testimony of the witness Finn to the effect that complaining witness stated that she was satisfied with the transaction.

The promissory note given by the defendant (Rec. p. 17) clearly demonstrates there was no false pretenses in any of the dealings of the parties.

The entire testimony is more consistent with innocence than guilt, therefore, the case should never have been submitted to the jury to speculate as to the guilt or innocence of the defendant, but should have been terminated by a directed verdict in favor of the defendant.

AUTHORITIES.

In *Weiner v. U. S.* 282 Fed. at p. 801, a prosecution for conspiracy, it is said:

“Every person is presumed to be innocent until his guilt is proved beyond reasonable doubt. The presumption of innocence is evidence in favor of the accused, introduced by the law in his behalf. This principle is axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”

“It is a maxim which ought to be inscribed in indelible characters in the heart of every judge and jurymen,” *Coffin vs. United States*, 156 U. S. 432, 453, 456, 15 Sup. Ct. 394, 404 (39 L. ed. 481).

“Unless there is *substantial evidence* of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the *substantial evidence* is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse a judgment of conviction.”

In *Scoggins vs. U. S.* 255 Fed. at p. 827, a prosecution for the sale of liquor, the general rule is stated thus:

“But it is indispensable to the maintenance of this verdict and judgment that there should have been substantial evidence of a sale or of an offer to sell some of the whiskey by the defendant. * * *

“* * * As the alleged contract here was illegal, and its making criminal, the legal presumption was that the defendant did not make it, and this presumption prevailed until he was proved to have done so beyond a reasonable doubt. The burden was upon the Government to make this proof, and evidence that is as consistent with innocence as with guilt is insufficient to sustain a conviction. Our search for substantial evidence in this record that the defendant ever consented to sell any whiskey to McDaniel has been in vain. The latter’s testimony goes no further than this;

that he saw the defendant on a side street on a Saturday night; that he put his arms around him and took a bottle of whiskey out of the defendant's pocket; that he told him he would see him Tuesday; that he offered to pay him something on that day, and the defendant refused to take the money." * * *

In *Sullivan vs. U. S.* 283 Fed. at p. 867, a prosecution for violation of the narcotic law, it is said:

"There was a legal presumption that Sullivan was innocent of this charge until he was proven to be guilty thereof beyond a reasonable doubt. There was no direct evidence that he ever saw, or had, or signed, or used that or any other order form to procure these or any other drugs, and he never claimed these. All the evidence, if any there was against him, was circumstantial.

"And evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the Appellate Court to reverse a judgment of conviction."

Citing a number of cases.

See to same effect—

Wright vs. U. S. 227 Fed. at p. 857.

Chass vs. U. S. 258 Fed. at p. 912.

Hart vs. U. S. 78 Fed. at p. 873.

Vernon vs. U. S. 146 Fed. at pp. 123, 125.

In *Vernon vs. U. S.* 146 Fed. 122, a prosecution for bribery, the Court says:

“No matter how reprehensible the conduct of the defendant might have been, under the indictment there could be no conviction unless there was substantial evidence justifying a finding by the jury that he had offered, given or promised to Blanton money for the purposes in the indictment set out.” * * *

“Circumstantial evidence warrants a conviction in a criminal case, provided it is such as to exclude every reasonable hypothesis but that of guilt of the offense imputed to the defendant; or, in other words, the facts proved must all be consistent with and point to his guilt only and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proved and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or of guilt the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted.” Citing a number of cases.

In *Sherman vs. U. S.* 268 Fed. at p. 518, a prosecution for receiving and concealing intoxicating liquors, it is said:

“The only fact pointing to criminality is that these goods were found in the defendant’s possession in a baby buggy covered with a pillow and quilt. The case is purely one of circumstantial evidence, and the rule in such cases is that the proof shall exclude every other reasonable hypothesis, except the guilt of the accused.”

Wright vs. U. S. 227 Fed. 855.

Garst vs. United States, 180 Fed. 339.

Vernon vs. U. S. 146 Fed. 121.

In *Wolf vs. U. S.* 238 Fed. at p. 906, a prosecution for concealing property in violation of the Bankruptcy Act the general rule is thus stated:

“* * * But moral probability, however strong cannot take the place of legal evidence, and inferences which the jury may draw in a case like this must be based upon facts which of themselves tend to establish the guilt of the accused. In our judgment, such a basis is not found in the case here presented.

“In the face of a situation like this, where suspicion is almost instinctive, we are liable to forget the nature and degree of that protection which the law affords by the presumption of innocence. It may therefore be profitable to recall the forceful words of Mr. Justice (now Chief Justice) White in *Coffin vs. U. S.*, 156 U. S. 458, 15 Sup. Ct. 404, 39 L. ed. 481.

“ ‘Now the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty. In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created.’ ”

In *Hart vs. U. S.* 84 Fed. 799, 808, the Court said:

“Now it is a familiar rule in criminal cases that, to justify a conviction upon circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

ADMISSION AND EXCLUSION OF EVIDENCE.

In the cross-examination of the defendant (Rec. p. 18) the District Attorney was permitted, over the objection and exception of the defendant, to inquire con-

cerning the factory of the Company in Pennsylvania. The Government's witnesses had not given any testimony whatever on this point. It was not later shown to be untrue. Therefore, it was immaterial and irrelevant and served no purpose except to prejudice the minds of jurors.

It is also submitted the court erred in permitting the Government to inquire of defendant if he had represented to *anyone* and more particularly Mary Ferguson, that he had sold Eleven Thousand Dollars worth of stock to Elie Sheetz. (Rec. p. 18.)

It will be observed that the testimony was not limited to Chautauqua Phonograph Company, Inc., stock, but stock in general and no time or place was fixed.

The book entry (Rec. p. 19) should have been admitted in evidence. The defendant had previously testified the certificate of deposit was received from Jane Ferguson on April 25, 1923, and his check to her in the sum of \$85.41 of that date was in evidence. This tended to substantiate the claim of defendant that the transaction was a loan of \$800. The entry in the ledger tended to corroborate the defendant. The entry of the deposit of \$900 (Rec. p. 19) was admitted. If that entry was admissible, the one of \$800 was for greater reasons admissible. It also tended to corroborate the defendant's testimony that the transaction occurred on April 25, 1923.

The testimony of Mary Ferguson (Rec. p. 21) was inadmissible for two reasons; First, it was not proper in rebuttal. The rule that similar acts of the defendant may be admitted against him when on trial for a certain offense, does not apply here. The testimony was not offered in the Government's case in chief. If

it was admissible at all, it would only be when offered in the Government's case in chief. Second, the time of the alleged statement was not given. Was it before Jane Ferguson obtained her stock or was it two weeks before the trial of the case? Further, the rule, when applicable, is that similar offenses may be shown. This was not testimony of a similar offense, but merely the bald statement to the effect that defendant stated he had sold \$11,000 worth of stock to Elie Sheetz in the Chautauqua Phonograph Company, Inc. It did not contradict the defendant for his testimony, over objection, was regarding stock in general, and no time or place was designated in the question to the defendant.

It is submitted the defendant was not accorded that fair and impartial trial as guaranteed under the Constitution, and that the case should be reversed.

Respectfully submitted,

ROBERT E. LYNCH,
Counsel for Appellant.

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In the Court of Appeals, District of Columbia

SPECIAL CALENDAR No. —

No. 4464

FRANK W. STECK, APPELLANT

v.

THE UNITED STATES OF AMERICA, APPELLEE

BRIEF ON BEHALF OF APPELLEE

STATEMENT OF CASE

The appellant in this case was first indicted on September 30, 1924, for the offense of false pretenses. He was subsequently tried under that indictment and acquitted as to both counts.

The appellant was reindicted on May 18, 1925, for the offense of false pretenses. The only material difference between the first indictment and the second indictment is that in the former indictment the date of a certificate of deposit is alleged to be July 2, 1923, whereas in the second indictment the date of the certificate is set forth as July 2, 1922.

Prior to the trial on the second indictment a special plea in bar was filed and overruled. The appellant was then tried on the second indictment, convicted and sentenced, and from that judgment this appeal was taken.

ARGUMENT

Appellant, in his brief (p. 2), sets forth five assignments of error which we will discuss in the order there raised.

Overruling of special plea in bar

Appellant, in the discussion of this assignment, sets forth many quotations and citations of cases. But while all the cases cited represent the law properly applicable on the facts in those particular cases, they in no wise support the position of the appellant in this case.

The indictment in this first instance charges the false pretense in obtaining of a certificate of deposit dated July 2, 1923. On that charge the appellant was acquitted for the reason which is apparent, namely, a fatal variance in the proof. In other words, the fact (the certificate of deposit dated July 2, 1922) was not sufficient to warrant a conviction under the first indictment, charging as it did a certificate dated July 2, 1923. The second indictment charged and demanded proof of a certificate dated July 2, 1922. It is therefore manifest that the leading case (*Nordlinger vs. U. S.*, 24 App. D. C. 409) cited by appellant not only supports the trial Judge's action in this case but, it being the decision of this Court, was mandatory on him under the facts. In that case this Court in no mistakable language said:

“ The test of the identity of offenses that has commonly been applied in such cases is

whether the facts necessary to conviction under the second indictment would have been sufficient, if proved, to warrant a conviction under the first. *Hopkins v. U. S.*, 4 App. D. C. 430, 436; 17 Am. Eng. Enc. Law, p. 597; 12 Cyc. Law & Proc. p. 280. For an application of this rule see *U. S. v. Nickerson*, 17 How. 204, 212, 15 L. ed. 219, 222."

In the more recent case of *Monroe v. U. S.*, 10 F. (2d) 645, this Court, following the Nordlinger case, said:

"The rule applied by this court is the same in effect as that applied by the Supreme Court. "The test of the identity of offenses that has commonly been applied in such cases is whether the facts necessary to conviction under the second indictment would have been sufficient, if proved, to warrant conviction under the first."

Also see

Magan v. Divine, 237 U. S. 632.

Burton v. U. S., 202 U. S. 344.

Singleton v. U. S., 294 Fed. 891.

Holtner v. U. S., 293 Fed. 381.

Muysby v. U. S., 275 Fed. 29.

Moorehead v. U. S., 270 Fed. 212.

U. S. v. Farhart, 269 Fed. 33.

Sufficiency of evidence to warrant submission to the jury

The weakness of this assignment is clearly demonstrated by the extreme to which appellant is forced to justify his contention. It is argued that the representation made by the appellant that Elie Sheetz had purchased \$11,000 worth of stock in the

Chautauqua Phonograph Company, Inc., was a collateral one. It is hard to understand by what process of reasoning such could be maintained when the record clearly discloses (R. 16) it was that representation which induced the purchase of the stock.

Appellant also, in his brief, contends that there was *no criminal intent* because he later bought back the stock, giving in payment therefor two promissory notes which were not paid at maturity. That conduct by the defendant would not be a defense even if, instead of worthless notes, he had returned the cash, as demonstrated by this Court in the case of *Claggett v. U. S.*, 53 App. D. C. 134. The repayment with worthless notes was in a measure evidence of his criminal intent at the time of the original transaction.

It is seriously urged that the evidence failed to show any defrauding. The record discloses that the appellant, in addition to assuring the complainant that she would not lose any money in the transaction and that the stock would pay twelve per cent, also represented to her that Elie Sheetz had purchased \$11,000 worth of the stock. The record (R. 17) demonstrates that at that time he knew Sheetz but had not sold him any of this stock or of any other kind of stock. The case of *Robinson v. U. S.*, 42 App. D. C. 192, cited by appellant as describing the essential elements of the crime of false pretenses, clearly demonstrates the sufficiency of the evidence in this case.

See also

Partridge v. U. S., 39 App. D. C. 571.

The Court should have directed a verdict of not guilty at the close of the entire case

Appellant's discussion under this heading is merely a rediscussion of the previous assignment.

The appellee does not dispute the soundness of the law set forth in support of this contention but suggests that the cases cited are not applicable in this case because the record shows that there was substantial evidence upon which the jury could and did render a verdict of guilty.

In the case of *Cady v. U. S.*, 54 App. D. C. 10, this Court said:

“ We are reminded of the well-established and oft-repeated principle that, unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused, and, where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a conviction. But it is not applicable here, because the facts established are such that the jury was fully warranted in deducing from them inferences which excluded every other hypothesis but that of guilt.”

Appellee suggests such is exactly the situation in this case.

See also

Burton v. U. S., 202 U. S. 344.

Knoble et al. v. U. S., 9 F. (2d) 567.

De Camp v. U. S., 10 F. (2d) 984.

Allen et al. v. U. S., 4 F. (2d) 890.

Admission and exclusion of evidence

It is contended that Government counsel should have been precluded from questioning the defendant with reference to a supposed factory in Pennsylvania. We submit that it was perfectly proper, as it had already been testified that the defendant, in addition to stating as a fact that Sheetz had purchased \$11,000 worth of stock, had also assured the complainant that she would lose no money in the transaction and that she would receive twelve per cent dividends. The question as to whether the Company had a factory and was prepared to manufacture phonographs would have a bearing on the good faith of the statement made by appellant.

Appellant contends that error was committed when the court permitted Government counsel, in cross-examination, to ask the defendant whether, at another time and to a different person, he had not stated that Elie Sheetz had purchased \$11,000 worth of stock in the Chautauqua Phonograph Company. It is also contended that it was improper to permit the Government to put that other witness on the stand in rebuttal, and testify that the defendant had made that representation to her.

When a defendant takes the stand in his own behalf, it is permissible to subject him to the same character of cross-examination that any other witness may be subjected to, and this cross-examination need not be confined to matters that were brought out in the examination in chief but may extend to other relevant and pertinent facts and circumstances. Whether he had made the representation to a person other than the complainant certainly was a pertinent and relevant fact and he having answered in the negative it was proper to offer rebuttal of that response.

The appellant's defense was that the complainant had given him the \$800 as a loan. In support of that contention there was offered an entry on page 115 of a certain ledger. (R. 19.) It was properly rejected because there was no notation of any kind that would indicate it to be a loan and more particularly a loan from the complainant Jane Ferguson.

CONCLUSION

It is urged that the Record in this case discloses no error warranting a reversal of the judgment and the direction of a new trial, and, therefore, the judgment of the court below should be affirmed.

Respectfully submitted.

PEYTON GORDON,

United States Attorney.

WILLIAM H. COLLINS,

Assistant United States Attorney,

Counsel for Appellee.